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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-624

ERNST RUSS STEAMSHIP COMPANY,

Petitioner,

vs.

JOHN MATTHEWS,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent, pursuant to Supreme Court Rule 24.5 hereby notifies the court of the relevancy of the decision of the United States Court of Appeals for the First Circuit in *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1980), now pending on a petition for a writ of certiorari, Docket No. 79-1587.

Although the thrust of the vesselowner's contentions in the court below here was that it was entitled to a directed verdict at the close of the plaintiff's case, and that judgment for the vessel should have been entered n.o.v., an ancillary argument was made that it was reversible error for the trial court to instruct the jury in accordance with Devitt and Blackmar's *Federal Jury Practice and Instructions*, §94.13 which provides "For purposes of this action injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. . . ." This instruction is usually given in FELA and Jones Act cases.

The *Johnson* case which is presently on petition for certiorari has an excellent discussion of the reasons why negligence in an action under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act should be no different than negligence under the Jones Act or FELA. The reasons cited are:

> (1) It is clear that the general congressional intent was to provide liberal recovery for injured workers. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 . . . and it is also clear that Congress intended no static remedy, but one which would be developed to meet changing conditions and changing concepts of industry's duty toward its workers. *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958);
>
> (2) the similarity of the work environment regulated by the Jones Act and §905(b) of the LHWCA;
>
> (3) the absence of the doctrines of assumption of the risk and contributory negligence as a total bar to recovery, all common to FELA, Jones Act and §905(b) cases;

(4) the absence of real property status classifications such as "invitee" and "licensee" under the Jones Act;

(5) the general body of case law extant under the Jones Act and its obvious usefulness;

(6) the absence in the Congressional Reports and Senate Reports on the 1972 amendments of an intent to alter the concept of "negligence" existing under the LHWCA as it existed before 1972.

The *Johnson* court, footnote 11, espouses the same theory which respondent maintained both in the district court and in the court of appeals, namely, that a longshoreman's cause of action is still maritime in nature, regardless of the 1972 amendments, and the body of admiralty law existing prior thereto was not intended to be changed by Congress, and there cannot possibly be a difference between post-1972 negligence and pre-1972 negligence in an action under the LHWCA. The Supreme Court in dictum found in *Edmonds* v. *Compagnie Generale Transatlantique*, ... U.S. ....., 99 S.Ct. 2753 (1979) reiterates that under the law maritime the longshoreman's recovery is diminished only by his proportionate contributory negligence, if any, and the vessel escapes liability if the stevedore is solely responsible for the injury, or if the longshoreman's own negligence is the sole—the only—proximate cause of his injury. Such concepts are plainly consistent with FELA and Jones Act principles of negligence, and consistent with the negligence concept of liability imposed on a vessel owner prior to the 1972 amendment, which abrogated the warranty of seaworthiness to the longshoreman. [See also, *Johnson*, 613 F.2d pp. 340-342].

As in *Clemons* v. *Mitsui O.S.K. Lines*, No. 79-706, in the court below, the jury returned a verdict for the plaintiff on special interrogatories consistenly answered. A differ-

ent panel of the Seventh Circuit than in *Clemons* affirmed the verdict. There was never any question in the court below that the cause of plaintiff's injuries was the ladder which was part of the ship's gear, and which was left in the lower hold for the use of the longshoreman by the crew, as testified to by the officer in charge of supercargo [Tr. pp. 367-374], Fritz Storbeck. As the issue of the open and obvious condition of the ladder was a question of fact for the jury, and the jury interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure, Title 28, U.S.C. were answered consistently, affirmance is necessary. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman,* 369 U.S. 355.

In the words of one of the most widely respected and well-reasoned opinions in the maritime field on this subject, the engagement in a polemic over "proximate cause" and "cause" would be to place "an emphasis on categories and labels which involves a high degree of formalism which experience has proved to be a fertile source of unrealistic distinctions, capricious results and all too many appeals on what should be questions of fact but are distorted into questions of law." *Shepler* v. *Weyerhauser Company,* 569 P.2d 1040 (279 Or. 477). Such is the case here. The Court of Appeals below came to the right conclusion for the correct reasons. The petition for a writ of certiorari in this case should not be granted.

Respectfully submitted,

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